STATE OF MICHIGAN

COURT OF APPEALS

KRISTINE COWLES,

Plaintiff-Appellant,

and

KAREN B. PAXSON,

Intervening Plaintiff-Appellant,

v

BANK WEST, f/k/a BANK WEST FSB,

Defendant-Appellee.

FOR PUBLICATION
August 5, 2004
9:05 a.m.

No. 229516
Kent Circuit Court
LC No. 98-006859-CP

Official Reported Version

Before: Gage, P.J., and O'Connell and Zahra, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent. I concur with the trial court that both Truth in Lending Act (TILA), 15 USC 1601 *et seq.*; claims of plaintiffs Kristine Cowles and Karen B. Paxson are barred by the applicable statute of limitations. Since both claims are barred by the statute of limitations, I would affirm the decision of the trial court. In addition to the statute of limitations issue, the $250 fee charged was "bona fide and reasonable."[1] *Brannam v Huntington Mortgage*

[1] The essence of the original complaint was that banks illegally practiced law when they charged a $250 fee for preparing mortgage closing documents. Unfortunately for plaintiffs, while this lawsuit was pending, the Supreme Court ruled that banks could charge a fee for this service. *Dressel v Ameribank*, 468 Mich 557, 568; 664 NW2d 151 (2003). Cowles amended the complaint to allege that the $250 fee was unreasonable and, therefore, a violation of TILA. However, the Sixth Circuit Court of Appeals recently held that this same fee was a "bona fide and reasonable" document preparation charge under 15 USC 1605(e)(2) and 12 CFR 226.4(c)(7), so the bank need not include it in its computation of the finance charge. *Brannam, supra*. Therefore, even assuming that the period of limitations had not run on Cowles's complaint, the TILA claim lacks sufficient legal merit to withstand summary disposition. In *Brannam, supra* at 606, the Sixth Circuit ruled that "the fee should be considered reasonable if it was for a service
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Co, 287 F3d 601, 606 (CA 6, 2002). Therefore, plaintiffs' TILA claim is meritless and remand would only further waste the state's limited judicial resources. I would affirm the decision of the trial court.

While the trial court eventually arrived at the correct decision in this case, it initially erred when it granted class status for plaintiff Cowles's TILA claim and allowed Cowles to represent the class. The period of limitations had run on Cowles's TILA claim before she filed her original complaint, in which she accused her bank of illegally engaging in the practice of law. Once the applicable period of limitations has run, it cannot be later tolled by filing new claims or amending a complaint. Therefore, the trial court certified Cowles as the representative for a class of litigants that she was legally barred from representing. MCR 3.501(A)(1). Because she was not eligible to represent the class, the rules expressly prohibited the trial court from certifying the class. MCR 3.501(A)(1)(d). "The threshold consideration for *class action certification* is that the proposed class representative must be a member of the class. A plaintiff who cannot maintain the cause of action as an individual is not qualified to represent the proposed class." *Zine v Chrysler Corp*, 236 Mich App 261, 287; 600 NW2d 384 (1999) (emphasis added). Because the filing of the original complaint never tolled the already expired period of limitations, Cowles had no viable TILA claim, and the trial court clearly erred when it certified the class.

Later, recognizing that it had erroneously certified the class and its representative, the trial court attempted to cure the error by properly dismissing all the claims. Before it dismissed the claims, however, the attorneys for the improperly certified class found another plaintiff (Paxson) who ostensibly could fit the bill as a class representative on the TILA claim. When issues arose regarding Paxson's eligibility, the attorneys proffered two more alternative representatives. The trial court properly dismissed the case anyway.

Plaintiffs now argue that the trial court should not have dismissed their TILA claim merely because the court erroneously certified the class and the period of limitations had run on Paxson's claim. I disagree. The applicable period of limitations on Paxson's TILA claim ran on February 9, 1998. The second amended complaint alleging the TILA claim was not filed until February 16, 1998. Because I would hold that the filing of Cowles's original, legally infirm complaint does not toll the statute of limitations, both Paxson and Cowles should be barred from representing the class and we should affirm the trial court's dismissal.

The majority opinion goes astray when it fails to acknowledge that neither the TILA claim nor the original claim of illegal practice of law ever had a legitimate basis in the law. Deciding to disregard this detail, the majority allows Paxson to litigate the stale TILA claim as though the legal fiction of class status can somehow resurrect it. Propping up its legal reasoning on the erroneously granted class status, the majority allows Paxson to emerge from anonymity,

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actually performed and reasonable in comparison to the prevailing practices of the industry in the relevant market." The Sixth Circuit found the fee reasonable under that standard, and we face an identical fee and the exact same issue as we review the validity of plaintiffs' TILA claim. I would affirm on this basis alone.

replace Cowles as class representative, and advance a new cause of action that Cowles could not legitimately assert herself.[2] The majority permits the substitution of claims and parties by glossing over Paxson's own failure to fit within the time restraints of the statute of limitations. Stretching the legal fiction of class status far beyond its rending point, the majority holds that the previously unknown Paxson, as a silent member of the ill-founded class, had actually asserted the new claim from the time of the original complaint. If the majority correctly deemed Paxson a new party,[3] the new claim would fail for tardiness. *Hurt v Michaels' Food Ctr, Inc*, 220 Mich App 169, 179; 559 NW2d 660 (1996).

The majority's contrary holding has more insidious ramifications than hyper-extending the statute of limitations on one claim for one group of litigants. It permits class litigants to ignore completely statutes of limitations as long as they can continue to muster fresh "class" plaintiffs with plausible causes of action stemming from the same general circumstances alleged in the complaint. If a court finds that one claim lacks legal support, the class's attorneys may simply conjure another legal issue, amend the complaint to include it, and avoid the running of any period of limitations by relating the claim back to their original, defeated complaint. If the representative did not suffer the new harm alleged or is legally barred from asserting it, the class may simply conjure one of its imaginary participants and put him at the class's helm. This approach allows a massive suit, brimming with countless phantom plaintiffs, to rise repeatedly from its own ashes like a litigious Phoenix until a vexed and exhausted defendant finally pays it enough money to haunt someone else.[4]

I would simply hold that the trial court clearly erred when it certified this class, so dismissal was proper. As a preemptive measure, I would also hold that certification of a class only tolls the statute of limitations for claims that originally and properly received certification. Any new claims would need separate class certification and would not benefit from the tolling

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[2] It bears noting that the trial court could have disposed of this case solely on the grounds that the original illegitimate complaint never provided notice of the possibility that the new claim, based on totally different legal grounds, might later arise. *American Pipe & Constr Co v Utah*, 414 US 538, 554-555; 94 S Ct 756; 38 L Ed 2d 713 (1974).

[3] The majority fails to draw the vital distinction between a member of the class and a party to the litigation. While class members have a conditional right to intervene and become a party, MCR 3.501(A)(4), when they do so they naturally become new party plaintiffs. Intervention by definition is the procedure by which "a third party is allowed to *become* a party to the litigation." Black's Law Dictionary (7th ed) (emphasis added). So essentially, by intervening, Paxson became a new party plaintiff, and the case law and court rules involving new parties apply here.

[4] An example well within the extreme would be a pharmaceutical case where a newborn was made a member of the class. Hypothetically, the majority opinion would allow the class to wait a year after the child turns eighteen to amend its complaint and add a completely new cause of action. MCL 600.5851(1). The delay could then perpetuate itself if the class remained open ended and new infants fell within the class description at the time of amendment. Fictions fail when they fail to assist justice. Delays cause real harm to litigants and, if encouraged, erode the integrity of the judicial system.

rules until the trial court separately certified them as worthy of class status, including the eligibility of the representative. This holding would not contradict MCR 3.501(F) and would prevent the farcical promotion of dormant parties for the sole purpose of circumventing traditional relation-back and tolling principles. Because the majority's result enables litigants to abuse class action procedures and the present claim is ultimately doomed on its merits, I would affirm the decision of the trial court.

/s/ Peter D. O'Connell